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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re D.J., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. D.J., Defendant and Appellant.	A125527 (Alameda County Super. Ct. No. SJ09012186-01)

The juvenile court found that defendant D.J. committed a lewd and lascivious act on a child under 14 (Pen. Code, § 288, subd. (a)); misdemeanor indecent exposure (Pen. Code, § 314, subd. (1)); and misdemeanor false imprisonment (Pen. Code, § 236). The court placed defendant on probation. One of the probation conditions requires defendant to have no contact with any children under the age of 12. Defendant contends the condition is unconstitutional because it does not require him to know that a particular child is under 12. We agree. We modify the probation condition to include a knowledge requirement, and otherwise affirm.

I. FACTS

Given the nature of the issue raised on appeal, we need not discuss the facts in detail.

On March 4, 2009, the victim, a 10-year-old girl whom we shall call Jane Doe, was at a recreational center playing a board game with a friend. Defendant, then almost

15, approached Jane Doe and placed his hand under Jane Doe's shirt and pants, touching the skin on her chest and her "private part." Jane Doe told defendant to stop, but he did not. Defendant exposed his penis to Jane Doe.

Defendant then followed Jane Doe into the bathroom, picked her up, and "humped" her, i.e., simulated sex by moving his hips back and forth. Again, defendant refused Jane Doe's entreaties to stop. Jane Doe escaped his grasp and ran from the bathroom.

Later that day, defendant grabbed Jane Doe and pulled her into a closet, where he again "humped" her.[1]

Sometime that day, defendant encountered Jane Doe outside the recreation center and told her to "Come suck my dick."

II. DISCUSSION

The juvenile court imposed a probation condition that defendant is "not to have any contact with any children under the age of 12 without appropriate adult supervision." Defendant contends this condition is unconstitutionally vague. He argues that without a requirement that he have *knowledge* that a particular child is under 12, the probation condition violates the due process requirement of fair warning. Defendant is correct.[2]

A probation condition must be sufficiently precise for the probationer to know how he must behave and what conduct he must avoid. Otherwise, the condition is subject to challenge for vagueness, based on the due process concept of fair warning. (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) The fair warning rule not only ensures adequate notice

[1] Jane Doe testified on direct examination that "humping" occurred in the closet. On cross-examination, she seemed to say she could not remember whether there was any inappropriate sexual activity in the closet.

[2] The Attorney General concedes that defendant may raise the issue for the first time on appeal. Defendant makes a facial challenge to the constitutionality of a probation condition, and we resolve the issue by reviewing abstract legal concepts rather than by scrutinizing specific facts and circumstances. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 885, 888−889 (*Sheena K.*).)

to the probationer, but prevents arbitrary law enforcement of vague and overbroad provisions. (*Ibid.*)

Probation conditions involving the persons with whom the probationer may or may not associate cannot pass constitutional muster without the element of knowledge. Otherwise, a probationer can violate probation by associating with someone he simply did not know was in the forbidden category. For instance, a probation condition forbidding association with anyone "disapproved of" by the probation department requires that the probationer "must know which persons were disapproved of by the probation officer." (*Sheena K., supra,* 40 Cal.4th at p. 890; see *id.* at pp. 891−892.) A probation condition prohibiting association with persons under 18 must require that the defendant *know* the person is under 18. (*People v. Turner* (2007) 155 Cal.App.4th 1432, 1435−1436 (*Turner*).) A condition forbidding association with gang members must be restricted to *known* gang members. (*In re Justin S.* (2001) 93 Cal.App.4th 811, 816 (*Justin S.*).)

Here, the probation condition prohibits "any contact" with a child under 12 unless there is adequate adult supervision. Thus, absent a requirement of knowledge, defendant could violate his probation by such innocent conduct as boarding a bus and sitting next to a girl who, unbeknownst to him looks like she is past her 12th birthday, but is actually younger. Or defendant could violate his probation by striking up a conversation while standing in line next to a child who turns out to be younger than 12. In short, defendant could face serious sanctions for perfectly innocent, legal conduct unless there is a requirement that he know that the person with whom he has contact is under the age of 12.[3]

[3] We also note that, given the realities of a densely populated urban society, prohibitions on associations or contact can easily be overbroad. (See, e.g., *In re Kacy S.* (1998) 68 Cal.App.4th 704, 712−713 [noting ban on association with anyone not approved by the probation officer would require the officer to approve the defendant's association with persons "such as grocery clerks, mailcarriers, and health care providers"].)

The Attorney General, acknowledging the controlling holdings of *Sheena K.* and *Turner*, states that he "[o]rdinarily . . . would also concede the knowledge requirement," but for the nature of the underlying offense of Penal Code section 288, subdivision (a). The Attorney General correctly notes that knowledge of the victim's age is not required for conviction of committing a lewd and lascivious act on a child under 14. (*People v. Olsen* (1984) 36 Cal.3d 638, 642−647.) The Attorney General argues that there should be no knowledge requirement in the probation condition because the reason for the *Olsen* rule is the "strong public policy to protect children of tender years." (*Id.* at p. 646.) The flaw in this reasoning is patent: the question of knowledge for one committing an obviously criminal sexual act on a young child is markedly different from the question of knowledge for a probationer doing nothing more than having innocent, everyday contact with another person. The conduct precluded is normally lawful activity.

The probation condition in this case is unconstitutionally vague because it lacks a knowledge requirement. The proper remedy is for us to modify the condition to impose an explicit knowledge requirement, thus rendering the condition constitutional. (*Sheena K., supra,* 40 Cal.4th at p. 892; *Turner, supra,* 155 Cal.App.4th at p. 1436; *Justin S., supra,* 93 Cal.App.4th at p. 816.)

Accordingly, we modify the probation condition to provide that defendant is "not to have any contact with any children he knows or reasonably should know to be under the age of 12 without appropriate adult supervision."[4]

[4] This is the language used by the *Turner* court. (*Turner, supra,* 155 Cal.App.4th at pp. 1436, 1437.)

III. DISPOSITION

The probation condition is modified to read as stated immediately above. With that modification, the jurisdictional and dispositional findings and orders are affirmed.

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Marchiano, P.J.

We concur:

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Dondero, J.

_____
Banke, J.